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Supreme Court, U.S.
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No. 05-1255

In the Supreme Court of the United States

PEDRO GUZMAN, PETITIONER

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals had jurisdiction to review the Board of Immigration Appeals' denial of discretionary relief from removal under former 8 U.S.C. 1182(C) (1994).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A4) is not published in the *Federal Reporter*, but is available at 163 Fed. Appx. 259. The judgment and order of the district court (Pet. App. A6-A15) is unreported. The opinions of the Board of Immigration Appeals (Pet. App. A16-A20) and the immigration judge (Pet. App. A21-A29) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 5, 2006. The petition for a writ of certiorari was filed on March 29, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The REAL ID Act of 2005 (REAL ID Act or Act), Pub. L. No. 109-13, Div. B, 119 Stat. 302, became effective on May 11, 2005. Section 106(a) of the REAL ID Act eliminates habeas corpus review of final orders of removal, and prescribes that the sole means of obtaining judicial review of a final order of removal is through a petition for review in the court of appeals pursuant to 8 U.S.C. 1252(a). See REAL ID Act § 106(a)(1)(B), 119 Stat. 310 (to be codified at 8 U.S.C. 1252(a)(5)).

Prior to the REAL ID Act, aliens who had been ordered removed based on their conviction of an aggravated felony were jurisdictionally barred from obtaining direct review of their removal orders in the courts of appeals. See 8 U.S.C. 1252(a)(2)(C). The REAL ID Act amends the law by allowing all aliens who are ordered removed, including aliens whose removal orders are predicated on their conviction of an aggravated felony, to obtain "review of constitutional claims or questions of law" by filing a petition for review in the appropriate court of appeals. REAL ID Act § 106(a)(1)(A)(iii), 119 Stat. 310 (to be codified at 8 U.S.C. 1252(a)(2)(D)).

The REAL ID Act prescribes that, in habeas cases pending in district court on the date of the Act's enactment, the district court should transfer the case to the appropriate court of appeals and that court should then treat the case as if it were a proceeding on a petition for review. REAL ID Act § 106(b) and (c), 119 Stat. 311. The courts of appeals have similarly concluded that, when a habeas case was pending on *appeal* on the date of the REAL ID Act's enactment, the court of appeals loses jurisdiction over the appeal but the habeas appeal should be converted into a proceeding on a petition for

review and treated as such by the court of appeals. See *Rosales* v. *Bureau of Immigration & Customs Enforcement*, 426 F.3d 733, 736 (5th Cir. 2005), cert. denied, 126 S. Ct. 1055 (2006); *Gittens* v. *Menifee*, 428 F.3d 382 (2d Cir. 2005); *Bonhometre* v. *Gonzales*, 414 F.3d 442 (3d Cir. 2005), cert. denied, 126 S. Ct. 1362 (2006); *Alvarez-Barajas* v. *Gonzales*, 418 F.3d 1050 (9th Cir. 2005).

2. Petitioner is a Mexican citizen who became a lawful permanent resident of the United States in 1990. In July 1992, petitioner pled guilty in state court to sexual assault of a child, his fourteen-year-old niece. The government charged petitioner with being subject to removal based on his conviction of an aggravated felony. Pet. App. A2, A22; see 8 U.S.C. 1227(a)(2)(A)(iii).

Petitioner admitted that he was removable, but sought a waiver of inadmissibility under former Section 212(c) of the Immigration and Nationality Act (INA), 8 U.S.C. 1182(c) (1994). The immigration judge (IJ) explained that, in light of the gravity of his offense, petitioner was required to demonstrate "unusual and outstanding equities" in order to be eligible for a waiver of inadmissibility under former Section 212(c). Pet. App. A23. The IJ granted petitioner's request for discretionary relief, determining that the equities were sufficiently unusual and outstanding to warrant a favorable exercise of discretion. *Id.* at A28-A29.

The Board of Immigration Appeals (Board) reversed and ordered that petitioner be removed to Mexico. Pet. App. A16-A20. The government argued that the IJ had erred both as a matter of law and as a matter of discretion.[1] Because the Board agreed with the government

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[1] In contending that the IJ had erred as a matter of law, the government argued that petitioner was ineligible for relief from removal under

that the IJ had erred in finding as a matter of discretion that petitioner was entitled to relief under former Section 212(c), the Board did not address the government's contention that the IJ had committed an error of law in resolving petitioner's claim for relief. *Id.* at A17-A18.

The Board explained that, under Board precedent concerning the exercise of discretion under Section 212(c), in light of the seriousness of petitioner's offense, he was required to establish "unusual or outstanding equities" in order to be considered further for relief. Pet. App. A18. The Board concluded that the equities the IJ identified as outstanding did not outweigh the gravity of petitioner's offense. *Ibid.* The Board emphasized that petitioner admitted to having statutorily raped his niece on two or three occasions. The Board explained that, while petitioner claimed that the sexual relations were consensual, petitioner had admitted that his niece had told him on at least one occasion that she did not want to engage in sexual relations. *Id.* at A19. The Board also determined that petitioner had failed to demonstrate rehabilitation as a positive equity, reasoning that petitioner "did not believe his actions with his niece were 'such a great crime'" and that petitioner had stated that he would have continued having sexual relations with his niece if she had not reported the crime to her school. *Id.* at A19-A20. The Board thus concluded that petitioner did "not appreciate either the wrongful-

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former Section 212(c) because Section 212 set forth no ground of exclusion comparable to petitioner's ground of removal (his conviction of sexual assault of a child). See Pet. App. A17. As petitioner notes (Pet. 8 n.3), the Board has since held that an alien is ineligible for relief from removal under former Section 212(c) in that situation. See *In re Blake*, 23 I. & N. Dec. 722 (BIA 2005).

ness of adults having sex with children or of incestuous sexual relationships." *Id.* at A20.

3. On April 14, 2004, petitioner filed a petition for habeas corpus relief in the district court. On January 21, 2005, the district court dismissed the habeas petition for lack of jurisdiction. Pet. App. A5-A15. The court explained that "federal courts retain habeas jurisdiction to review statutory and constitutional claims, but there is no jurisdiction to review denials of discretionary relief by an IJ or the BIA." *Id.* at A12 (citing *Bravo* v. *Ashcroft*, 341 F.3d 590 (5th Cir. 2003)). The court determined that petitioner "failed to state any cognizable constitutional or statutory claims in his petition," and that the court lacked jurisdiction to review the Board's discretionary denial of relief under former Section 212(c). *Id.* at A13.

The court of appeals affirmed. Pet. App. A1-A4. On May 11, 2005, while petitioner's appeal was pending, the REAL ID Act was enacted. Although petitioner's appeal of the dismissal of his habeas petition was pending on the date of the REAL ID Act's enactment, neither petitioner nor the government requested the court of appeals to convert the appeal into a proceeding on a petition for review, see pp. 2-3, *supra*, and the court did not do so. The court instead continued to treat the case as if it were a habeas proceeding. The court agreed with the district court that petitioner had "fail[ed] to state any cognizable constitutional or statutory claim in his [habeas] petition," and that the district court lacked habeas jurisdiction to review the Board's denial of discretionary relief under former Section 212(c). Pet. App. A3-A4.

ARGUMENT

Neither petitioner nor the government requested the court of appeals to convert petitioner's habeas appeal into a proceeding on a petition for review pursuant to the REAL ID Act, and the court of appeals treated the appeal as a habeas appeal. Petitioner does not challenge the court of appeals' treatment of his appeal as a habeas appeal, and that treatment presents no reason for this Court to grant review.

As the court of appeals correctly determined, Pet. App. A3-A4; see *id.* at A12-A13, petitioner raised no constitutional or statutory claim in his habeas petition, but instead sought review of the Board of Immigration Appeals' denial of discretionary relief under former Section 212(c). The court thus found that there was no jurisdiction to review petitioner's claim. If the court of appeals had treated petitioner's habeas appeal as a proceeding on a petition for review, the court would have reached the same conclusion. Under 8 U.S.C. 1252(a)(2)(B)(ii), as amended by the REAL ID Act, "no court shall have jurisdiction to review" any "decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security," such as the discretionary decision whether to grant relief under former Section 212(c).

Although the REAL ID Act sets forth that any such limitations on judicial review do not "preclud[e] review of constitutional claims or questions of law raised upon a petition for review," REAL ID Act § 106(a)(1)(B), 119 Stat. 310 (to be codified at 8 U.S.C. 1252(a)(2)(D)), petitioner raises no constitutional claim or question of law.

Petitioner acknowledges that, in light of his conviction of sexual assault of a child, he was required under Board precedents to establish "unusual or outstanding equities" to obtain discretionary relief under former Section 212(c). Pet. 7. The Board explicitly applied that standard here. Pet. App. A18. Thus, even assuming, arguendo, that a standard the Board has chosen to articulate in exercising its own discretion under Section 212(c) could present a "question of law" within the meaning of REAL ID Act § 106(a)(1)(B), 119 Stat. 310 (to be codified at 8 U.S.C. 1252(a)(2)(D)), no such question is presented here.

Petitioner contends that the Board "improperly weighed the equities" (Pet. 10) in denying him discretionary relief. The Board's fact-specific, discretionary determination in that regard, however, raises no "question of law" within the meaning of REAL ID Act § 106(a)(1)(B), 119 Stat. 310 (to be codified at 8 U.S.C. 1252(a)(2)(D)).

Petitioner incorrectly suggests (Pet. 7) that the Board "completely ignored [his] rehabilitation." The Board expressly acknowledged that petitioner "has been crime-free for eleven years and has attended various counseling programs," Pet. App. A19, but concluded that, while those considerations were "relevant," they failed to outweigh other considerations warranting the denial of Section 212(c) relief, *id.* at A19-A20.

Finally, petitioner erroneously invokes (Pet. 8) the rule of lenity, a rule that bears on the construction of a criminal statute, not the making of a discretionary determination such as the decision whether to award petitioner discretionary relief from removal under former Section 212(c). See, *e.g.*, *Leocal* v. *Ashcroft*, 543 U.S. 1, 11 n.8 (2004). Ultimately, petitioner disagrees with the

manner in which the Board exercised its discretion, and that disagreement presents no question of law subject to judicial review under REAL ID Act § 106(a)(1)(B), 119 Stat. 310 (to be codified at 8 U.S.C. 1252(a)(2)(D)).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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